UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

LEBANITE CORPORATION
and/or R. E. SERVICE COMPANY

and **Case 36-CA-9463-1**

WESTERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL 2554, affiliated with UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA

and

OREGON PANEL PRODUCTS, LLC

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for the General Counsel.

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and R. E. Service Company.

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DECISION

Statement of the Case

CLIFFORD H. ANDERSON, Administrative Law Judge: I heard the above-captioned case in trial on November 2 and 3, 2004, and January 26, 2005, pursuant to an order consolidating proceedings, amended complaint, compliance specification and notice of hearing issued by the Regional Director for Region 19 of the National Labor Relations Board (the Regional Director) on May 28, 2004. Post hearing briefs were due on March 23, 2005.

The amended complaint and compliance specification is based on a charge filed by the Western Council of Industrial Workers, Local 2554, affiliated with the United Brotherhood of Carpenters & Joiners of America (the Charging Party or the Union) against Lebanite Corporation (Lebanite) and/or R. E. Service Company (RES) and Oregon Panel Products, LLC (OPP) on October 10, 2003, amended on November 7, 2003, and docketed as Case 36-CA–9463-1.

Respecting Lebanite: The complaint, as amended at the hearing, alleges, inter alia, that Lebanite had a collective-bargaining agreement with the Union respecting unit employees at its Lebanon, Oregon facility which extended by its terms from October 21, 2000 to September 30, 2004. The complaint further alleges that Lebanite on and after April 28, 2003, failed and refused to provide the Union with requested information relevant to fulfilling its function as representative of employees. It also alleges Lebanite, on and after about July 1, 2003, repudiated the contract refusing to comply with its terms and, on or about August 1, 2003, ceased operations and laid-off all its employees – all without prior notice to the Union or affording it an opportunity to bargain respecting the effects of its actions. Finally the complaint alleges with respect to Lebanite, that the conduct described above violates Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). In the compliance specification the Regional Director alleges a specific liquidated remedy for unit employees arising from the unfair labor practices alleged.

Lebanite did not file an answer contesting either the complaint or the compliance specification. At the opening of the hearing, I granted the General Counsel's unopposed[1] motion for default judgment against Lebanite respecting both the unfair labor practice allegations and the compliance specification. Neither RES nor OPP in their answers denied the allegations of the compliance specification, save that each denied those elements of the complaint which asserted grounds for extending liability for the remedial requirements of the specification to them. At the opening of the hearing, I granted the General Counsel's unopposed motions for limited, partial default judgments against both RES and OPP respecting the compliance specification elements of the Director's May 28, 2004 order consolidating proceedings, amended complaint, compliance specification and notice of hearing.

Thus, as a result of the pleadings, stipulations of counsel at the hearing and the positions taken by the parties respecting the three trial motions of the General Counsel described above, there was no dispute respecting: 1) all elements of the complaint and compliance specification concerning Lebanite and 2) respecting RES and OPP there was no dispute regarding the complaint or the compliance specification's terms, save as to the responsibility of RES and OPP, if any, for the unfair labor practices and for the compliance specification remedy for the violations, as set forth in greater particularity below.

Respecting RES: The amended complaint alleges, and RES denies, that Lebanite and RES at all material times were a single-integrated business and/or a single employer and, in consequence, that RES is jointly and severally liable with Lebanite for the unfair labor practices, the remedy set forth in the compliance specification and any other remedy directed to Lebanite.

Respecting OPP: The amended complaint alleges and OPP denies, that OPP has continued as the employing entity with notice of Lebanite's potential liability to remedy its unfair labor practices and is a successor to Lebanite and jointly and severally liable for the remedy directed against Lebanite.

[1] Counsel VanCleave, appearing for both Lebanite and RES, made it clear that while Lebanite was not opposing the motion, RES was denying and defending against the joint employer/single employer, joint and several liability allegations of the complaint.

Findings of Fact

Upon the entire record herein, including helpful briefs from RES, OPP, and the General Counsel, I make the following findings of fact.[2]

I. Jurisdiction[3]

Lebanite is a State of Oregon corporation which had an office and a place of business in Lebanon, Oregon until October 2003 where, until on or about August 2003, it was engaged in the business of manufacturing laminate wood products. RES is a California corporation with an office and place of business in Lodi, California, where it is engaged in the manufacture and distribution of materials used in making printed circuit boards. OPP is a State of Oregon corporation which at relevant times had an office and place of business in Lebanon, Oregon where it was engaged in the business of manufacturing laminate wood products.

Lebanite, during the period July 1, 2002 to July 1, 2003, in the course and conduct of its business operations, manufactured and shipped to sources outside the State of Oregon, goods and materials valued in excess of $50,000. RES during the 12-month period prior to the issuance of the complaint, a representative period, in the course and conduct of its business operations, manufactured and shipped goods or provided services from its California facilities to customers outside the state, or sold and shipped goods or provided services to customers within California which customers were themselves engaged in interstate commerce by other than indirect means, of a total value of $50,000. OPP, in the 12-month period following October 24, 2003, in the course and conduct of its business operations, manufactured and shipped to sources outside the State of Oregon, goods and materials valued in excess of $50,000.

Based on the above, there is no dispute and I find that Lebanite, RES and OPP have been, and each of them, at all times material, has been, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The record establishes, there is no dispute, and I find the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Lebanite Corporation and R. E. Service Corporation

Lebanite, the product, is a longstanding, patented trade name for an engineered composite hardboard panel developed and manufactured at a facility in Lebanon, Oregon (the facility). While Lebanite was made in different thicknesses and densities, it comprised the essentially exclusive product of the facility. Through the facility's many years of operations, the facility and the associated rights to manufacture and use the trade name Lebanite have been

[2] As a result of the pleadings and the positions and stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

[3] The jurisdictional facts were established by the pleadings or the stipulations and admissions of counsel at trial.

owned and operated by various forest product organizations including Champion International, U.S. Plywood, and Georgia-Pacific. In January 2000, R.E. Service, a Subchapter S, California corporation with offices and a manufacturing facility in Lodi, California, purchased the facility as an ongoing operation from Georgia Pacific holding it under a newly formed corporation, Lebanite Corporation, a Subchapter S, Oregon corporation wholly owned by R.E. Service. Mr. Mark Frater was and has at all times material been the founder, President, Chief Executive Officer and a 90% owner of RES.

The Union had long represented employees at the facility and Lebanite recognized the Union as the exclusive representative of its employees in the following unit (the Unit) appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full, regular part-time and temporary production employees, maintenance employees and transportation employees employed by Lebanite Corporation at its Lebanon, Oregon facility; excluding all professional employees, temporary construction employees, independent contractors and their employees, guards and supervisors as defined in the Act.

Lebanite and the Union entered into a collective-bargaining agreement, effective by its terms from October 21, 2000 to September 30, 2004. In 2001 the unit comprised approximately 200 employees, but thereafter was greatly reduced as discussed below.

Lebanite's General Manager was Robert "Skip" Walker, a long time employee who assumed the General Manager position in 2002. He testified he initially reported to Alex Watt, Lebanite's Chief Operating Officer and accountant who maintained offices both at the RES facility in Lodi, California and at the Lebanon facility. Upon Watt's departure, Walker testified, Watt's duties were assumed by Mr. Mark Frater. Mr. Walker as Lebanite's General Manager closely consulted with Watt and thereafter with Frater on production decisions as well as all decisions involving expenditures of funds. Frater worked at his RES offices in Lodi California, but was in regular telephonic contact with Walker respecting Lebanite's operations and prospects. Walker testified that from the beginning of RES's ownership of Lebanite in 2000, all its product prices were set by Frater. RES's General Manager, Jeff Mason, also regularly participated in twice monthly telephonic conference calls in which sales and miscellaneous management topics would be discussed and decisions taken.

The product "Lebanite", Lebanite Corporation's sole product, had primary application as a hardboard used as a component material in furniture and doors becoming part of the final product. It was also used as transformer board, exit drill board and saw board in the electronics industry. In the latter uses, the product was used in the manufacturer of electronics and did not become part of the final product.[4] During the period 2000 into 2001, Lebanite's production of exit drill board represented between 30% and 50% of the facilities output.

At relevant times, RES was solely engaged in manufacturing in the printed circuit board business providing drill board type laminates and copper and aluminum foils, tooling plates and various accessories related to manufacturing circuit boards, and generally related to a laminating process done by RES. During the period 2000 into 2001, RES purchased 25%–30% of Lebanite's exit drill board output. Walker testified that initially, RES paid the same price

[4] Thus, for example, exit drill board is used as backing for circuit boards when holes were drilled in them preventing harm to the circuit board during the drilling process. Saw board served the same function during the process of sawing or cutting circuit boards.

for the products it purchased from Lebanite's as its other buyers. Later, however, he was told by Watt that Watt had reduced RES's prices to eliminate the approximately 40% mark-up that Lebanite charged as its gross profit over its cost. Walker testified that prices did not change upon Watt's departure, so Walker believed the discount remained in place for RES purchases.

Mr. Clay David Donne, the Lebanite Distribution Sales Manager from October 2001 to its closure, testified that during his tenure customers paid about $153 per thousand square feet for Lebanite L-30, a popular product type, but that RES throughout his tenure paid "$50 to $60 per 1000", a price of between a third and 40% of the price paid by others. His NLRB-prepared investigatory affidavit stated that he did not know the prices paid by RES, but at trial Donne asserted that he had misunderstood the Board Agent's question and the affidavit was incorrect, because the RES price was in the Lebanite computer system and he was familiar with it.

Mr. Frater testified that RES purchased its Lebanite materials from Lebanite Corporation paying essentially the same price for like volumes that other customers paid. In late 2001 and into 2002 it became uneconomical for RES to use Lebanite as drill board and it no longer purchased it. RES did continue to use Lebanite blemished and off specification output as saw board in 2002 and 2003, but Frater testified: "[M]ost of the saw board we got from Lebanite, we just took", i.e. the product was neither invoiced by Lebanite nor paid for by RES.

Various market factors combined to reduce Lebanite's sales volume. Mr. Frater testified the national collapse of what has come to be known as the ".com boom" seriously reduced the manufacture and sale of electronic equipment, the manufacture of which was a significant basis for sales of Lebanite. Further, other electronic manufacturers who had been purchasing Lebanite earlier became reluctant to do so when RES, a competitor, acquired Lebanite. Finally, other similar but cheaper hard board products produced abroad became increasingly competitive in all market areas in which Lebanite was used and competitors' sales further reduced Lebanite's sales volume and market share. In the aggregate these factors very seriously reduced Lebanite's sales volume beginning soon after RES's acquisition, a sales deterioration that continued and worsened over time. In response Lebanite instituted various cost reduction measures. The unit employee compliment was substantially reduced, other staff was reduced, and the actions alleged in the complaint as unfair labor practices during this period were taken. Despite these efforts the operation became uneconomic and, in August 2003, the plant ceased operation and was closed. While there was initial hope the closure would be temporary, circumstances did not change and the facility remained closed.

B. Lebanite Corporation and Oregon Panel Products, LLC

During the deterioration in Lebanite's sales and production described above, Lebanite engaged in the admitted unfair labor practices set forth in paragraphs 8, 9 and 10 of the complaint. Thus Lebanite improperly refused to provide the Union with requested relevant information in and after April 2003, repudiated the contract on and after July 2003 and closed the facility laying off all its employees in August 2003. During these events, Mr. Walker was Lebanite's General Manager and, while not a decision maker with respect to Lebanite's actions, was both aware of them and aware of the Union's protests concerning them.

Following the closure of the Lebanite facility and cessation of its operations, when initial attempts to sell the facility proved unavailing, Messrs. Walker and Donne and a third investor, Mr. Terry Butler, determined to acquire the rights to resume operations. They formed Oregon Panel Products, LLC, which on or about October 24, 2003, entered into agreements with Lebanite and its creditors to lease the Lebanite operation. Neither Lebanite nor RES nor its

principal, Mark Frater, held any financial interest in OPP. Mr. Walker was OPP's General Manager. Mr. Donne was its General Sales Manager.

OPP entered into a lease agreement with Lebanite and Mr. Frater covering the plant, and all equipment on the premises. The terms of the lease provided for monthly payments to Lebanite and to Lebanite's bank holding notes on the property. An option to purchase lay with OPP. The documents comprise a substantial commercial lease with numerous clauses including indemnity obligations on the part of the tenants and personal guarantees of Frater respecting Lebanite's performance.

OPP took possession of the Lebanite site and in November 2003 commenced hiring and initiated cleanup and inspection. By December 2003 production began and over two or three month's cleanup and repair took less time and staffing and production was increased. Over time the original employee compliment of about a dozen increased to a maximum of 52.

OPP operated with less manufacturing supervision, had less stratified, more generalized production job functions and paid lower wages to its employees than Lebanite. The employee complement was roughly an equal portion of former Lebanite employees and employees without such prior experience. Employee applicants and employees were told that OPP was not Lebanite, but rather was an independent entity and was not bound by Lebanites recognition of the Union nor its collective-bargaining agreement. OPP at no time recognized the Union as the representative of its employees.

Despite every effort to lower production costs, attempts to create new products and renewed sales efforts, the difficult economics circumstances described previously got worse and sales were and remained weak. The interim period when the facility was closed – August into October 2003 had sent Lebanite's former customers looking for alternate supply and suppliers and they did not return to OPP in sufficient numbers as had been hoped. In early 2004 material costs increased significantly. In sad summary, the resumption of operations was not viable. In April 2004, OPP determined to abandon its operations and that month the employees were laid off and the plant was shut down.

C. Analysis and Conclusions

1. The Relationship Between Lebanite and RES

The complaint alleges at paragraph 5 that Lebanite and RES have been at all material times a single-integrated business and/or a single employer within the meaning of the Act. The Board has long examined the following factors to determine if two employing entities constitute a single employer:[5] (1) common ownership, (2) interrelation of operations, (3) common management, and (4) centralized control of labor relations. Not all of these criteria must be present to establish single employer status, and a significant factor is the absence of an "arm's length relationship found among unintegrated companies." *Denart Coal Co.*, 315 NLRB 850, 851 (1994). Both counsel for the General Council and for RES recognized the Board's approach and addressed each of the relevant factors. Counsel for RES emphasized that under *Masland Industries*, 311 NLRB 184, 186 (1993) and *Dow Chemical Co.*, 326 NLRB 288 (1998), the burden of establishing whether two entities constitute a single employer rests with the General Counsel.

[5] The fountainhead case approving the doctrine is *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255 (1965).

There is no dispute that the two entities involved herein, Lebanite and RES, have identical ownership: Lebanite is wholly owned by RES which in turn is 90% owned by Mr. Mark Frater, the President of each. Merely because Lebanite is a wholly owned subsidiary of RES, that legal relationship does not, of itself, cause the parent and subsidiary to constitute a single employer within the meaning of the Act. *Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989).

Respecting the interrelationship of operations, save for RES's use of Lebanite as saw and drill board, there was essentially no interrelationship of operations. There was no record evidence of unit employee transfers, shared production equipment or common suppliers or customers. As described above, RES initially used a substantial amount of Lebanite's hardboard product, Lebanite, as both saw board and drill board. Over time however that use was very substantially reduced.

Concerning common management, Lebanite and RES had their own hierarchy of supervision. There was however a degree of overlap and consultation. Thus, Mr. Frater was the President of each entity. Lebanite's General Manager Robert Walker, generally in charge of day to day operations, initially reported to Alex Watt, Lebanite's Chief Operating Officer who maintained offices both at the RES facility in Lodi, California and at the Lebanon, Oregon facility. His title and authority at RES was not made clear on the record. Later, following Watt's departure, Walker testified he reported to Frater and regularly held telephonic conferences with RES's General Manager, Jeff Mason.[6] Importantly, Walker also testified that he had no authority to make any decisions respecting financial matters and, as the need arose, made requests of and took instruction from Frater. Frater in turn meets with RES's General Manager to discuss RES's business matters. I found Walker to be the more convincing witness respecting his limited authority over Lebanite operations as opposed to Fraters self description of his more own limited role.[7] Common management may be found where the separate managerial hierarchies take close instruction from a common owner. *Masland Industries*, 311 NLRB 184 (1993).

Respecting centralized control of labor relations, day to day management at Lebanite resided with Walker and local supervision. Clearly however the larger policy decisions were taken by Frater. Thus decisions respecting final approval of contract negotiations, the various decisions taken by Lebanite regarding the actions found to be unfair labor practices, and the various instructions to Walker given in managing the consequences of these decisions were all handled by Frater. While there was little evidence respecting Frater's control of labor relations with RES, Frater testified that as the President of RES he could and did make decisions respecting labor policy as a matter of right. These facts in their totality support a finding of centralized control over labor relations. "In assessing the appropriateness of single employer treatment, the fact that day to day labor matters are handled at the local level is not controlling." *Pathology Institute*, 320 NLRB 1050, 1063 (1996).

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[6] Mr. Walker was a principal in OPP and therefore arguably aligned in interest with the General Counsel in establishing RES's joint liability for Lebanite's remedial obligation which joint liability had the potential to lighten any possible obligation of OPP. Nonetheless I found him a straightforward and honest witness whose testimony seemed to be given completely from memory without self censure and without editing. I fully credit all aspect of his testimony.

[7] Mr. Frater was less direct and forthcoming in his testimony and was frequently disputative on the stand. I also found his demeanor less convincing than Walker who was an unusually believable witness.

Considering these factors under the Board guidlines, it is a close question whether the General Counsel has met his burden of establishing that Lebanite and RES together constitute a single employer. It is unnecessary to decide the issue at this point in the analysis, however, because the significant factor of the arms-length relationship between the two entities needs still to be considered.

The testimony respecting the price RES paid for Lebanite's hardboard products was at variance. As set forth above in greater detail, Mr. Walker testified that after an initial period, RES paid much less for the products it bought than other suppliers, in effect obtaining the product at or close to Lebanite's cost. Mr. Donne corroborated this testimony. Mr. Frater denied that this was so, testifying rather that RES paid in effect what other customers buying like volume of product paid.

The amount billed and received for sales of its commercial product is normally a matter recorded in invoices and other financial documents. The General Counsel subpoenaed Lebanite's records respecting this question, however the records were allegedly lost in some fashion after the close of Lebanite's operations and OPP's initiation of operations -- apparently while being shipped from Lebanon, Oregon to Lodi, California. The General Counsel challenges this evidence and seeks an adverse inference against RES and Mr. Frater that the records would have corroborated the testimony of Walker respecting the price paid by RES for Lebanite's product. RES opposes that request. I do not find it necessary to resolve the matter because I find that a similar inference may be drawn against RES for not providing its own records of what it paid for the product. Both commercial sales and commercial purchases are subject to documentation. RES and Frater had the means to document their contentions as to the prices paid for Lebanite product, but did not offer such business records.

Further, even without the adverse inference, I credit Walker, and the corroborating testimony of Clay David Donne,[8] over Frater respecting the prices paid by RES for Lebanite products. It is even possible that Frater did not know the price that was paid by RES. In all events, I find that RES received a very favorable, unreasonably favorable, non-arms length, price for Lebanite product and this price was far superior not only to the price paid by other customers of Lebanite, but beyond any price based on an arms-length relationship. In other words, I find the price to constitute significant evidence that RES and Lebanite were not dealing with one another on an arms length basis.

This determination is reinforced by the testimony of Mr. Frater that RES in effect simply took, without any payment whatsoever, truckloads of blemished Lebanite product for use by RES as saw board. Even if blemished or off specification product did not have the full market worth of unblemished material, and the record does not establish the particulars relevant here, the fact that RES simply took Lebanite output in truckload lots without any compensation whatsoever, is beyond question not an arms length transaction.

Given all the above, and based on the record as a whole, the other factors discussed above, and the less than arms-length relationship manifested in the very favorable product pricing of its regular products and the gratis provision of product seconds to RES for use as saw board, I find that the General Counsel has met his burden of proving that Lebanite and RES were a single employer. Two companies which are geographically separate may constitute a

[8] Mr. Donne's testimony was inconsistent with his affidavit as discussed above. None the less, I was impressed with his testimony and demeanor and credit his explanation of the confusion that resulted in the variation between his recollection at trial and the recorded recollection of his affidavit. I credit his testimony respecting Lebanite product pricing to RES.

single employer where there is other evidence of an interrelationship between them. *Allegheny Graphics*, 320 NLRB 1141, 1143 (1996). I find that to be the case here.

I therefore find that the General Counsel has met his burden of showing that Lebanite and RES are a single employer as alleged in paragraph 4 of the complaint and that RES is therefore jointly and severally liable, with Lebanite, for the unfair labor practices alleged in the complaint, as well as the posting of the notice contained in the motions for summary judgment and for the compliance specification remedy also in the motion and as directed herein.

2. The Relationship Between Lebanite and OPP

The complaint alleges at paragraph 3 and the General Counsel argues that OPP is a successor employer to Lebanite under the Supreme Court's decision in *Golden State Bottling Co.*, 414 U.S. 168 (1973). The Court in Golden State accepted the Board's doctrine that a successor was required to remedy the unfair labor practices of its predecessor of which it was aware at the time of acquisition. The Court made clear that this doctrine of sucessorship is broader than the general rules of corporate law respecting the liability of purchaser for the debts or liabilities of its seller. The Court stated, 414 U.S. at 182 n. 5:

> The refusal to adopt a mode of analysis requiring the Board to distinguish among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the "employing industry," the public policies underlying the doctrine will be served by its broad application. . . .

a. Was OPP Aware of Lebanite's Unfair labor Practices at the Time of Acquisition?

The General Counsel argues that OPP well knew of the unfair practices of Lebanite at the time of their commission and also knew that the Union had been seeking relief obtaining this knowledge through Mr. Walker, Lebanite's General Manager and at all relevant times OPP's subsequent principal and agent.[9] Indeed, Mr. Walker engaged in conversations both with Union officials and with Lebanite's principal, Mark Frater, respecting Lebanite's unfair labor practice conduct and the Union's grievances respecting that conduct -- all well before OPP took over Lebanite's operations.

The government notes that the burden of proving a lack of successor knowledge of the predecessor's unfair labor practices is on the alleged successor and argues OPP has not sustained that burden here. In particular the General Counsel relies on S. Bent & Brothers, 336 NLRB 788 (2001), in which the Board made it clear the successor need be aware only of the unfair labor practice conduct and need not be aware of a particular unfair labor practice Board charge or a Board issued unfair labor practice complaint.

Counsel for OPP argues on brief that while Walker did have initial knowledge of Lebanite's failures to meet its commitments to the unit employees, neither Walker nor OPP were aware of subsequent developments after the closure. Thus OPP was not aware of the unfair labor practice charges, the Unions post-closure efforts and what, if any actions Lebanite had taken with the agreement of the Union or otherwise to resolve the disputes. Counsel emphasizes Walker's testimony: "As far as I knew, that the trust and Mr. Frater had worked something out."

[9] OPP was not named in the October 10, 2003, charge nor was it served with it. It was however named in the November 7, 2003, amended charge which charge was served on OPP on or about that same date.

Having considered the arguments of the parties at the hearing and on brief in conjunction with the record as a whole, I find, in agreement with the General Counsel and the cited S. Bent & Brothers decision, supra, that OPP at the time of its acquisition of the Lebanite facility was in fact aware of the conduct of Lebanite that is the basis for the unfair labor practice findings herein.

b. Was there Substantial Continuity of the Employing Industry?

"The keystone in determining sucessorship is whether there is substantial continuity of the employing industry." *Miami Industrial Trucks. Inc. and Bobcat of Dayton, Inc.*, 221 NLRB 1223, 1224 (1975). Factors which the Board considers in making this assessment include "whether there is substantial continuity in operations, location, work force, working conditions, supervision, machinery, equipment, methods of production, product and services." (Id.)

The General Counsel argues on brief at 16-17 that there was substantial continuity in the employing industry in the Lebanite to OPP transition. Counsel for the General Counsel acknowledges the hiatus in operations from August to November 2003, but notes that OPP principals Walker and Donne were on the premises during that period and maintained contact with customers and negotiated an agreement with Frater respecting OPP's lease of Lebanite's premises and equipment.

Counsel for the General Counsel notes the site location and its general process of manufacturer remained the same for each entity. The facilities plant and equipment was used to manufacture the product without significant purchase of new manufacturing equipment beyond maintenance and repair. The final product, Lebanite, essentially the entire output of both Lebanite and OPP, was unique to the facility and Lebanite, the product name, was a licensed trademarked appellation. While due to deterioration in market conditions customers were not identical, there was substantial overlap.

Addressing commonality of supervision, workforce and working conditions, the government argues that continuity does not depend on retention of the original workforce or even a majority of that workforce and that in all events OPP employed a substantial, significant number of Lebanite's former employees. The General Counsel further argues that there is no particular significance to the fact that OPP's wages were about half of Lebanite's unit wages. Respecting supervision the General Counsel argues that two front line supervisors, Heinback and Passi, had been Lebanite supervisors and that Donne, Walker and Office Manager, Ms. Shirley Oxford, held the identical positions with OPP they had earlier held with Lebanite.

Counsel for OPP argues on brief that OPP was but a short-term leaseholder which did not acquire the business of Lebanite. As such, it could not have negotiated for indemnity or a hold harmless agreement and therefore should not be held liable for Lebanite's conduct. In making his argument counsel relies on the Board's decision in *Hill Industries*, 320 NLRB 1116 (1996). In that decision, and in *Glebe Electric*, 307 NLRB 883 (1992), the Board focused on the nature of the business relationship between the predecessor and alleged successor. In *Hill*, the alleged Golden State successor leased rather than purchased equipment from the predecessor on terms that allowed either party to terminate the arrangement on 30 day's notice. The Board found that under such circumstances the successor had no opportunity to negotiate indemnity or other relief for the successor's conduct. The Board stated at 307 NLRB at 1117:

> And because the agreement allowed either party to terminate the arrangement on a month's notice, neither [the alleged successor] nor [the predecessor] could have known

> at the time the agreement was reached how long they could expect to benefit from it. In these circumstances, it is difficult if not impossible to know what practical benefit [the alleged successor] received as a result of the agreement. Thus, the record fails to show that, in negotiating over the terms of its equipment-storage-and-use agreement with [the predecessor], [the alleged successor] could have effectively insulated itself from potential exposure to liability for [the predecessor's] unfair labor practices. Nor does it show that [the alleged successor] could have secured indemnification from [the predecessor] as part of this transaction.
>
> Accordingly, we find that the overall nature of the establishment of [the alleged successor] operations was ultimately not of a type under which [the alleged successor] could have effectively negotiated a method of insulation from liability for [the predecessor's] unfair labor practices.

In *Hill* however the business of the alleged predecessor and successor were not the same, but were sufficiently different for the judge to find the successor was not a Golden State successor based essentially on that fact alone.

OPP argues that there was no discussion of Lebanite's unfair labor practices or any potential liability for them in the negotiations between Lebanite and OPP respecting OPP resuming operations at the facility. Further, counsel argues that OPP received neither favorable treatment nor a compromise on price in the negotiations based on unfair labor practice conduct or potential liabilities. Neither an indemnity nor a hold harmless clause was incorporated in the final agreement.

I have considered the arguments of the parties in light of the case law and the record as a whole. I find that there is substantial continuity in the employing industry for the following reasons. First and foremost, both Lebanite and OPP operated the same Lebanite, Oregon facility using the same equipment to produce essentially the same product. OPP was clearly leaner and meaner and improvised and reorganized its staff in an attempt to hold down costs, make do with equipment that was not new or it the best of repair, and achieve efficient production with a smaller workforce paid much less that Lebanite's bargaining unit.

As counsel for OPP has eloquently argued, the work force was not the same, suppliers and customers were not identical, the principals of OPP were trying new ways to make a go of it knowingly taking up an operation where Lebanite had failed. Yet, it was the same site, the same general manufacturing process and the same manufactured output. Significant proportions of the workforce, the suppliers and the customers were the same. The dearth of customer demand for its hard board product which caused it to cease operations was in many ways the same circumstance that laid Lebanite low.

In reaching this conclusion I have considered and rejected counsel for OPP's argument that it, like the alleged Golden State successor in Hill Industries, supra, should not be held liable because it could not have negotiated an indemnity or other relief for its predecessor's conduct. I reject this argument because I find that in fact OPP could have negotiated or at least tried to negotiate such an agreement. Thus I note that the lease negotiated included an indemnification clause binding OPP and a personal guarantee given by Mr. Frater insuring compliance with certain provisions by Lebanite. OPP could well have sought indemnification or other provisions respecting Lebanite and its derivative's potential future liability for Leabonite's unfair labor practices. Unlike Hill, OPP was in essence taking over Lebanite's entire operation. This was no collateral or minor, smasll scale, slightly related junction of unrelated business interests. OPP was seeking to take over all of Lebonite which was at the time a closed operation. In such a

context OPP had leverage and, if it had sought and failed to obtain satisfactory treatment for the potential unfair labor practice risks OPP would assume in taking over the operation, OPP could have declined to enter into an agreement with Lebonite unless the terms were satisfactory to it.

I am also aware that OPP entered into a lease agreement terminable at short notice by any party. The Court in *Golden State* however made it clear, as quoted above, that it approved of the Board's disinclination "to distinguish among mergers, consolidations, and purchases of assets." (414 U.S. at 182, n. 5.) I therefore do not find the means by which OPP took over the operation to be of major importance. OPP took over the operations by means of an agreement with Lebanite which had options allowing OPP to purchase the property. It could have negotiated indemnities or other protection for unfair labor practice liability as noted. The form of the commercial agreement between the predecessor and the successor here does not defeat or limit the relationship I have found above.

I find therefore that OPP took over Lebanite's operations, preserving substantial continuity in the employing industry at a time when it knew of Lebanite's conduct found to constitute unfair labor practices herein.

c. Balancing the Conflicting Interests

I have found OPP is a *Golden State* successor to Lebanite. Is it therefore jointly and severally liable, without limit, for the remedy of the unfair labor practices of Lebanite as found herein? The Board in *S. Bent & Brothers*, 336 NLRB 788 (2001), at 793, restated the current policy respecting evaluation of the equities of the Golden State successor relationship:

> The determination of whether a successor is obligated to remedy its predecessor's unfair labor practices involves a balancing of "the conflicting legitimate interests of the bona fide successor, the public, and the affected employee[s]." [Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973)] 414 U.S. at 181. The balancing process includes an emphasis on protection for the victimized employee, who may be "without meaningful remedy when title to the employing business operation changes hands." Id. (citing Perma Vinyl Corp., 164 NLRB at 969). Guided by these principles, we find that the interests of the public and the victimized employees in this case are best served by requiring Samuel Bent to remedy the unfair labor practices of its predecessor, Bent.[9]
>
> [9] Interests of the public, which must be weighed, include avoidance of labor strife and prevention of a deterrent effect on the exercise of Sec. 7 rights, which may occur if victimized employees find themselves without remedy. 414 U.S. at 184–185.

However, counsel for OPP argues on brief at 13:

> OPP respectfully submits that even if it is considered a bona fide successor, Golden State and its progeny require that a balance be struck among the legitimate conflicting interests of successors, the affected employees, and the public. Fundamental to this balance is whether a successor who is on notice is in the best position to redress the violations without being unduly burdened. In this case, there is no evidence that OPP was aware of, or bargaining based on, its potential liability. In any event, OPP, having gone out of business, is in no position to remedy any unfair labor practices found against Lebanite and/or RE Service Company, and there is no evidence of any bad faith or impropriety in OPP's decision to cease operations.

OPP makes the point that, whereas the cases describe making a successor liable for the unfair labor practices of the predecessor as a means of providing the employees with a meaningful remedy, this is a balancing determination. Here OPP is itself out of business after only a six month attempt to become a viable manufacturer. Arithmetically, the sums due under the compliance specification are roughly a like amount to the total OPP lease agreement payments for the six months that OPP operated the Lebanite facility. OPP was not a huge financial conglomerate in its Lebanon, Oregon operation and the dollar amount of the remedy directed herein is not small.

Are the equities here so disproportionate that the obligations of OPP as a successor should be eliminated or reduced on equitable or balancing grounds? Board cases give no guidance in reducing a liquidated remedy of the type involved herein, although counsel for OPP cites United States Circuit Court of Appeals in Board and Department of Labor cases where he argues such balancing occurs. See e.g. *Steinbach v. Hubbard*, 51 F3d. 843 (9th Cir. 1995), *Coronet Foods, Inc. v. NLRB*, 158 F3d 782, 795 (4th Cir. 1998). I am not aware of the Board ever in effect reducing the amount of liability by some portion under a balancing process in *Golden State* cases.

Having considered the arguments of the parties, the cited cases and the record as a whole, I find and conclude that OPP, as a bona fide successor to Lebanite with knowledge of its unfair labor practice conduct, should be found jointly and severally liable with Lebanite for the entire remedy directed against it herein. The Board has not suggested that portions of liability or elements of the remedy directed should be apportioned or reductions made. The Board has consistently found an alleged successor to be jointly and severally liable for all the known conduct of the predecessor or not liable at all: No apportioning, all or nothing. On the facts present herein, the balance to be struck among the legitimate conflicting interests of successors, the affected employees, and the public must favor the employees and the public. I therefore sustain complaint paragraph 3 of the complaint and find OPP is liable to remedy the unfair labor practices alleged in the complaint and the liquidated remedy set forth in the compliance specification and below.

REMEDY

The General Counsel's motions for summary judgment and partial summary judgment, granted at the opening of the hearing as described above, provide as the remedy to the unfair labor practices and in remedy of the compliance specification a specific order and notice.[10] The remedy directed herein, including the notice, is that set forth in the granted summary judgment motions adjusted to incorporate Board procedural requirements. Lebanite, RES and OPP are jointly and severally liable for the remedy directed.

Conclusions of Law

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. Lebanite Corporation, R. E. Service Company and Oregon Panel Products, LLC are, and each has been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[10] The General Counsel's Motion for Summary Judgment, Exhibits 8(a) and 8(b) in the record as General Counsel's Exhibit 2.

2. At all material times, the Lebanite Corporation and R. E. Service Company, constitute a single employer within the meaning of the Act.

3. On or about October 24, 2003 and at all times thereafter, Oregon Panel Products, LLC has continued to be the employing entity with notice of Lebanite Corporation's potential liability to remedy its unfair labor practices and is a successor to the Lebanite Corporation.

4. The Charging Party is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

5. The Charging Party represents the Lebanite Corporation's employees in the following unit, which is appropriate for bargaining within the meaning of Section 9 of the Act:

> All full, regular part-time and temporary production employees, maintenance employees and transportation employees employed by Lebanite Corporation at its Lebanon, Oregon facility; excluding all professional employees, temporary construction employees, independent contractors and their employees, guards and supervisors as defined in the Act.

6. Lebanite Corporation violated Section 8(a)(5) and (1) of the Act by engaging in the following acts and conduct respecting the unit set forth above:

a. At all times since April 30, 2003, failing and refusing to provide the Charging Party requested information relevant to its duties as the exclusive representative of unit employees.

b. Since on or about July 1, 2003, repudiating the contract, which repudiation included its failure and/or refusal to pay (or on behalf of) unit employees the following:

i. vacation pay
ii. 4th of July holiday pay
iii. floating holiday pay
iv. bonus pay
v. wage increase effective July 1, 2003
vi. pension contributions
vii. medical insurance payments

c. On or about August 1, 2003, ceasing operations and laying off all employees and thereafter leasing its facility on or about October 24, 2003, all without prior notice to the Charging Party and/or affording the Charging Party an opportunity to bargain with respect to the effects of such conduct.

7. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, and in particular the proposed order in the motion for summary judgment granted at the beginning of trial, as described supra, I issue the following recommended Order.

ORDER[11]

The Lebanite Corporation, R. E. Service Corporation and Oregon Panel Products, LLC, their officers, agents, successors, and assigns, shall, jointly and severally:

1. Cease and desist from:

(a) Failing and refusing to furnish the Western Council of Industrial Workers Local 2554 affiliated with United Brotherhood of Carpenters and Joiners of America with the information requested by it, relevant and necessary to their representation of unit employees.

(b) Failing and refusing to notify and offer to bargain with the Union respecting the effects of its closure of its Lebanon, Oregon facility.

(c) Since on or about July 1, 2003, repudiating the contract, which repudiation included its failure and/or refusal to pay (or on behalf of) unit employees the following:

i. vacation pay
ii. 4th of July holiday pay
iii. floating holiday pay
iv. bonus pay
v. wage increase effective July 1, 2003
vi. pension contributions
vii. medical insurance payments

(d) On or about August 1, 2003, ceasing operations and laying off all employees and thereafter leasing its facility on or about October 24, 2003, all without prior notice to the Charging Party and/or affording the Charging Party an opportunity to bargain with respect to the effects of such conduct.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Pay to the employees named below the amounts set forth next to their names, consistent with the compliance specification, with interest to be computed in the manner prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987):

[11] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

Employee	Back Pay Owed
Anderson, Edwin	$4,031.53
Bergh, James L.	$5,674.88
Bottcher, Dennis Mervyn	$5,371.27
Breshears, Chuck E.	$3474.48
Burbach, David C.	$4,053.73
Christensen, Richard L.	$7,084.55
Coelho, Lanita Ann	$2,505.71
Davis, Duane A.	$2,415.22
Doll, Harold J.	$294.80
Evans Sr., Michael L.	$6,464.40
Fast, Gordon L.	$3,816.90
Flanagan, Terry Lee	$5,275.26
Fraba, George F.	$9,460.36
Grill Byron G.	$2,464.73
Grumbo Jr., Frederick N.	$5,106.43
Hoover, Kenneth Gene	$5,424.05
Hopkins, Howard E.	$5,381.77
Horner, Ralph M.	$2,922.35
Hubbard, James L.	$4202.78
Huston, Kevin A	$3,268.30
Johnson, Pillip Morris	$3,091.26
Jones, Sammy L.	$5,533.25
Lawson, Robin R.	$2,710.90
Lindley, Russell A.	$2,510.82
Lowman, Julius M.	$4,009.81
Lyons, Donald J.	$4,639.68
Marshall, Ronnie J.	$5,167.69
Mitsch, Richard E.	$3,282.43
Neal, Johnnie D.	$5,436.42
Nissen Jerry L.	$5,736.82
Oeder, Michael Gene	$5,620.13
Orr, Earl W.	$3,762.94
Peters, Brian E.	$3,105.65
Peters Ernest J.	$6,974.10
Pettner, Charles A.	$4,031.67
Plagmann, Lynn E.	$4,039.58
Port, Stanley D.	$3,576.24
Ridenour, Rosalie Y.	$3,441.34
Robertson, Benny	$5,425.20
Rounsavelle, Donald	$3,200.68
Ryan, Michael W.	$7,294.29
Ryan, Robert E.	$5,107.84
Selensky Jr., Steven P.	$3,631.83
Stevens, David W.	$1083.31
Stoering, Rodney E.	$3,504.41
Summers, Larry	$4,849.61
Tansley, Ronald C.	$4,407.83
Thayer, Matthew E.	$4,634.62
Torres, Francisco	$1059.04

Tuma, Gary N.	$3,172.87
Walls, Terry N.	$7,015.60
Ward, Virgil Ray Jr.	$5,811.16
Webb, Daniel D.	$3,994,16
Zwetzig, Terry A.	$1,883.55
Total:	$231,440.27

(b) Provide, to the extent it has not already done so, the information requested by the Union in it letter dated April 30, 2003.

(c) Upon request bargain collectively with the Union with respect to the effects on its unit employees of its decision to close its facility in Lebanon, Oregon, and reduce to writing any agreement reached as a result of such bargaining.

(d) Considering that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall, within 14 days after service by the Region, duplicate and mail, at its own expense an exact copy of the attached Notice to the Union and to all of its unit employees employed at its former Lebanon facility during the period from April 10, 2003 through August 31, 2003.[12] Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Copies of the notice, on forms provided by the Regional Director for Region 19, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt thereof.

(e) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Issued at San Francisco, California, this 28th day of April, 2005.

ca

Clifford H. Anderson
Administrative Law Judge

[12] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

FEDERAL LAW GIVES EMPLOYEES THE RIGHT TO

- Form, join or assist a union
- Chose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Chose not to engage in any of these protected activities

An employer subject to the National Labor Relations Act must collectively bargain with the labor organization that represents its employees concerning wages, hours, and working conditions. While an employer need not bargain with a union about its determination to cease all operations and go out of business, it must give the union notice of such a decision and an opportunity to bargain concerning the effects of such a sale, lease, and/or closure upon employees represented by the labor organization.

WE WILL NOT interfere with your free exercise of any of these rights;

WE WILL NOT fail or refuse to timely furnish Western Council of Industrial Workers Local 2554 affiliated with United Brotherhood of Carpenters of America, (the Union), information that is relevant and necessary to its role as the exclusive representative of employees in the unit described below.

WE WILL NOT repudiate the contract with the Union by refusing to abide by its terms, including the failure to properly pay to unit employees, 4th of July holiday pay, floating holiday pay, bonus pay, a wage increase, pension contributions; and/or medical insurance payments.

WE WILL NOT fail and refuse to notify the Union of our decision to cease operations for our business, layoff employees, and lease our Lebanon, Oregon facility to Oregon Panel Products, and WE WILL NOT fail and refuse to provide the Union with an opportunity to bargain respecting the lease and closure of our facility, and the laying off of our employees.

WE WILL NOT in any like or related manner violate the National Labor Relations Act.

WE WILL furnish the Union, in a timely manner, the information it requested by letter of April 30, 2003.

WE WILL upon request, bargain with the Union with respect to the effects on our employees of the decision to cease operations, layoff employees, and lease our Lebanon, Oregon facility to Oregon Panel Products, and reduce to writing any agreement reached as a result of the bargaining

WE WILL pay unit employees named in the Order in this decision, the amount set forth next to their names with interest.

The Union represents employees in the following unit:

> All full, regular part-time and temporary production employees, maintenance employees and transportation employees employed by Lebanite Corporation at its Lebanon, Oregon facility; excluding all professional employees, temporary construction employees, independent contractors and their employees, guards and supervisors as defined in the Act.

Lebanite Corporation
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 Second Avenue, Federal Building, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC DOCUMENTS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above.